

**UNITED STATES OF AMERICA  
THE NATIONAL LABOR RELATIONS BOARD  
REGION 9**

---

STEIN, INC.

*Respondent; and*

Case No. 09-CA-214633

Case No. 09-CA-215131

Case No. 09-CA-219834

INTERNATIONAL UNION OF  
OPERATING ENGINEERS, LOCAL 18

*Respondent; and*

Case No. 09-CB-214595

Case No. 09-CB-215147

TRUCK DRIVERS, CHAUFFEURS AND HELPERS  
LOCAL UNION NO. 100, AFFILIATED WITH THE  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

*Charging Party; and*

LABORERS' INTERNATIONAL UNION OF  
NORTH AMERICA, LOCAL 534

*Charging Party.*

---

**RESPONDENT INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL  
18'S MOTION FOR AN ORDER REQUIRING THE PARTIES TO PRESENT THEIR  
RESPECTIVE CASES-IN-CHIEF OUT OF ORDER**

Now comes Respondent, International Union of Operating Engineers, Local 18 ("Local 18"), and hereby respectfully moves the Court for an Order requiring the parties to present their respective cases-in-chief out of order. For the reasons more fully articulated herein, Respondent's Motion is well-taken and should therefore be granted.

Respectfully Submitted,

*/s/ Timothy R. Fadel*

TIMOTHY R. FADEL (0077531)

Fadel & Beyer, LLC

The Bridge Building, Suite 120

18500 Lake Road

Rocky River, Ohio 44116

(440) 333-2050

tfadel@fadelbeyer.com

*Counsel for Respondent International Union  
of Operating Engineers, Local 18*

## **BRIEF IN SUPPORT**

This consolidated matter is set to commence by hearing on September 12, 2018. The consolidated cases involve two separate Complaints and corresponding Charging Parties – Teamsters Local 100 and Laborers’ Local 534 – yet involve nearly the same underlying facts, Respondents, and theories of liability against the Respondents. On August 22, 2018, the parties held a conference call with ALJ Gollin to discuss a variety of issues, including hearing logistics. Given the factual congruency between the two Complaints in this matter, the parties discussed the feasibility of permitting the General Counsel, Charging Parties, and Respondents to fully examine each witness they intended to call *once* (followed by any cross-examination, redirect, and so on) in pursuit of their respective cases-in-chief in both cases. Under this alternative model, the witnesses would not need to appear multiple times, as they would under the traditional model wherein the General Counsel fully prosecutes its own case, which is then followed by the respective presentation of the Charging Parties’ and Respondents’ cases. In a follow-up correspondence to the parties on August 24, 2018, ALJ Gollin asked if the parties were willing to stipulate to calling witnesses out of order in the manner described *supra*. The parties were unable to so stipulate.

In light of the parties’ collective failure to stipulate to a more expedient form of witness examination, Respondent Local 18 formally moves the Court for an Order requiring the parties to present their respective cases-in-chief out of order such that witnesses need to only appear once at the hearing. Specifically, Local 18 proposes that the General Counsel first proceeds with direct examination of a witness, followed by any further examination (direct and/or cross) by the Charging Parties, and then concluded with examination by the Respondents (direct and/or cross). After this first round of examination concludes, General Counsel, Charging Parties, and

Respondents will have the opportunity – in that order – to engage in any further redirect examination and/or recross-examination as necessary.

The ALJ’s power to “[r]egulate the course of the hearing,” Board Rule § 102.35(a)(6), includes the inherent authority to permit examination as proposed by the Union. In this vein, § 2-300 of the ALJ Bench Book recommends that judges consider FRE 611(a) when exercising their authority in this manner. For its part, FRE 611(a) provides that “[t]he court should exercise reasonable control over the mode and order of examining witnesses[.]” *See also Community Hosp. of Cent. Cal.*, 335 NLRB 1318, 1343 (2001) (“The Board is required to follow the Federal Rules of Evidence to extent practicable,” such as FRE 611(a)). “Often, ‘[t]he convenience of the jurors, the court, and the witnesses may all be best served by receiving . . . testimony ‘out of order’ in certain circumstances.’” *Howard v. Bd. of Edn. of Memphis City Sch.*, 70 Fed. Appx. 272, 279 (6th Cir. 2003), quoting *United States v. Bailey*, 444 U.S. 394, 413, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980). Indeed, under FRE 611(a), “[c]ourts frequently take witnesses out of order to accommodate scheduling and logistical issues[.]” *United States v. Robertson*, D. Ariz. No. CR-14-01466, 2016 BL 198518, \*20 (June 21, 2016), *aff’d*, 895 F.3d 1206 (9th Cir. 2018). It is no surprise then that ALJs have permitted parties to examine witnesses out of order when the circumstances so permit. *See Indus. Constr. Servs., Inc.*, 323 NLRB 1037, 1037-38 (1997); *Bell Halter, Inc.*, 276 NLRB 1208, 1210 (1985).

Given that the instant hearing will cover two consolidated cases in an *ad seriatum* nature, the ALJ would properly exercise his authority in “[r]egulat[ing] the course of the hearing,” Board Rule § 102.35(a)(6), by ordering that the parties’ respective witnesses be placed on the stand such that the General Counsel, Charging Parties (to the extent they put on a case), and the Respondents could – in that order – pursue their respective cases-in-chief with each witness, resulting in each

witness only having to appear once. This approach, if granted, would proceed in lieu of having the General Counsel put on all of its witnesses in presenting its case-in-chief for both consolidated cases, followed by the Charging Parties (to the extent they put on a case), and the Respondents, in that order. Under the latter approach, witnesses would be required to appear at least twice on multiple hearing dates. However, Local 18's proposal, if granted by ALJ Gollin, is a proper exercise of his authority under Board Rule § 102.35(a)(6) because it is designed to minimize "scheduling and logistical issues," in light of the *ad seriatum* nature of this case. *Robertson*, 2016 BL 198518 at \*20. Given that both cases involve nearly identical facts, parties, and Complaint allegations, requiring the witnesses to appear only once, even if they are examined out of order, "best serve[s]" the "convenience of the court[]" and the witnesses[.]" *Howard*, 70 Fed. Appx. at 279. Moreover, none of the parties will be prejudiced by this Order, as each party will still have the opportunity to full cross-examine and rehabilitate each witness.

Accordingly, for all the foregoing reasons, Local 18 respectfully moves the Court for an Order requiring the parties to present their respective cases-in-chief out of order.

Respectfully Submitted,

/s/ Timothy R. Fadel  
TIMOTHY R. FADEL (0077531)  
Fadel & Beyer, LLC  
The Bridge Building, Suite 120  
18500 Lake Road  
Rocky River, Ohio 44116  
(440) 333-2050  
tfadel@fadelbeyer.com  
*Counsel for Respondent International Union  
of Operating Engineers, Local 18*

## CERTIFICATE OF SERVICE

A copy of the foregoing was electronically filed with National Labor Relations Board,  
Division of Judges, served via email to the following on this 7th day of September, 2018:

Julie C. Ford  
Stephanie Spanja  
Doll, Jansen & Ford  
111 W. First St., Suite 1100  
Dayton, Ohio 45402  
jford@djflawfirm.com  
sspanja@djflawfirm.com  
*Counsel for Charging Party*  
*Teamsters Local 100*

Ryan Hymore  
Mangano Law Offices Co., LPA  
3805 Edwards Rd., Suite 550  
Cincinnati, Ohio 45209  
rkhymore@bmanganolaw.com  
*Counsel for Charging Party*  
*Laborers' Local 534*

Keith L. Pryatel  
Kastner Westman & Wilkins, LLC  
3550 W. Market St., Suite 100  
Akron, Ohio 44333  
kpryatel@kwwlaborlaw.com  
*Counsel for Respondent Stein, Inc.*

Daniel Goode  
National Labor Relations Board,  
Region 9  
John Weld Peck Federal Building  
550 Main Street, Rm. 3003  
Cincinnati, Ohio 45202  
daniel.goode@nlrb.gov  
*Counsel for the General Counsel*

/s/ Timothy R. Fadel  
TIMOTHY R. FADEL (0077531)